

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

77-4049

United States Court of Appeals

FOR THE SECOND CIRCUIT

GENERAL DYNAMICS CORPORATION, ELECTRIC BOAT DIVISION,

Petitioner,

—against—

BENEFITS REVIEW BOARD; DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAM; UNITED STATES DEPARTMENT OF
LABOR; SAMMIE L. GRAY; AND INSURANCE COMPANY OF
NORTH AMERICA,

Respondents.

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APPEAL FROM THE BENEFITS REVIEW BOARD BRIEF FOR PETITIONER

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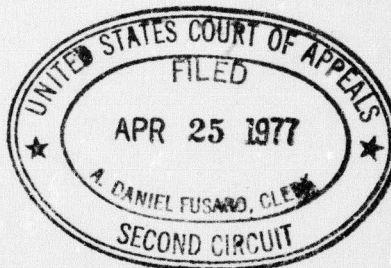




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APPEAL FROM THE BENEFITS REVIEW BOARD BRIEF FOR PETITIONER

Preliminary Statement

This is an appeal by General Dynamics Corporation, Electric Boat Division, as a self-insured employer, pursuant to 33 USC §921, from a decision of the Benefits Review Board, reported at 5 BRBS 279, which affirmed as modified the order and decision of the Administrative Law Judge (hereinafter Adm. Law Judge), Peter McC. Giesey dated December 18, 1975 (75-LHCA-571 and 572).

The Benefits Review Board found Mr. Sammie Gray, an employee of General Dynamics since 1962, had the occupational disease of asbestosis and was permanently, totally disabled therefrom. It also found General Dynamics, as self-insurer, and not its carrier, the Insurance Company of North America, was liable for the entire award.

Issues Presented for Review*

1) Whether the Benefits Review Board erred in not finding Gray had an injury (the occupational disease of asbestosis) *as of April 1, 1973, or earlier* based on the uncontradicted medical evidence in the record, and that Gray's subsequent period of disability commencing in September, 1973 was a recurrence of that pre-existing occupational disease due to its natural progression.

2) Whether the Benefits Review Board erred in using as a test for determining *carrier* liability, as distinguished from employer liability, the date Gray said he first became aware that his symptoms were related to his employment (September or October, 1973) rather than the date upon which the uncontradicted medical evidence shows Gray suffered a disabling injury due to an occupational disease, viz., April 1, 1973 or earlier.

Stated differently, where the essential dispute is between insurance carriers and not between employee and employer, should the uncontradicted medical evidence control the issue of when an occupational disease (the "injury") and hence insurance coverage, existed.

3) Whether the Insurance Company of North America (hereinafter INA) which insured General Dynamics for workmen's compensation benefits from before 1962 to April 1, 1973, has the burden of proving that Gray continued to be exposed to "injurious stimuli" between May 1,

* The following issues decided by the Benefits Review Board are *not* being appealed by the petitioner; the finding that Mr. Gray's disability is permanent, total and the overtime issue. Thus, there is no dispute existing between Mr. Gray and General Dynamics. Mr. Gray has received and will continue to receive the full amount of compensation for his injury.

1973, when he returned to work and September 27, 1973, when he again left work, and if so, did INA fail to meet its burden?

Statement of Facts

Sammie L. Gray was employed by the Electric Boat Division of General Dynamics Corporation from 1962 until 1967 or 1968; and from 1970 until March 20, 1973; and from May 1, 1973 to September 27, 1973. During most of this time he worked as a pipe lagger installing asbestos insulation in submersible vessels (127-131a).*

From 1954, to April 1, 1973, INA was the workmen's compensation insurer for the Electric Boat Division of General Dynamics pursuant to the Longshoremen's and Harbor Workers' Compensation Act (hereinafter the LHWCA), 33 USC § 932(a)(1) (111a). After April 1, 1973 General Dynamics became a self-insurer pursuant to 33 USC § 932(a)(2) for purposes of workman's compensation under the LHWCA.

The medical evidence in this case demonstrates that the manifestations of asbestosis do not occur until between five and ten years after first exposure to the disease-causing asbestos fibers.

Medical History:

Beginning in *June, 1972*, Gray began to experience difficulties in breathing and lost seven days of work (2a, 11a, 138a). In *August, 1972*, Gray went to the outpatient department of the Lawrence & Memorial Hospital (hereinafter Hospital) complaining of breathing problems located on his left side. This was diagnosed as probable pleuritis

* References are to pages in the Appendix.

(61a). In *September, 1972*, x-rays were taken of Gray which showed the presence of "pleural scarring" (60a).

Beginning *mid-March, 1973*, Gray was absent from work for medical reasons for approximately six weeks with complaints of lung problems (2a, 11a, 137a). The Adm. Law Judge found that in March, 1973, Gray "*experienced a disabling illness* consisting of generalized pulmonary nose and throat difficulties." (Emphasis added, 11a). It is noted that INA was General Dynamics' workmen's compensation carrier at this time and all during Gray's employment with General Dynamics prior thereto.

Mr. Gray returned to work at General Dynamics Electric Boat Division on May 1, 1973 (137a). On September 25, 1973, Gray visited the Hospital complaining of breathing problems (66a). Due to his deteriorating pulmonary condition, Gray ceased work again on September 27, 1973 and was admitted to the Hospital for emergency treatment and observation on October 9, 1973 (69a-71a).

Mr. Gray remained in the Hospital from October 9, 1973 to October 19, 1973 for observation and extensive diagnostic testing (69a-78a). On October 31, 1973, Gray underwent diagnostic surgery and a biopsy was performed. The post operative diagnoses were asbestosis, pleurisy and fibrosis of the left lung (80a, 92a, 94a, 96a, 98a).

On January 30, 1974, Gray's physician informed him that he could not work in the presence of asbestos (92a). Gray has not worked since September 27, 1973 and has been receiving and will continue to receive workmen's compensation under the LHWCA on the basis of permanent total disability, retroactive to September 27, 1973. There is no issue in this appeal between General Dynamics and Gray.

The Administrative Proceedings:

By letter of April 1, 1974, Gray's attorney presented notice of intention to claim workmen's compensation benefits to the employer, General Dynamics (99a). This notice was acknowledged by letter of the employer dated April 16, 1974 and referred Mr. Gray's attorney to the INA and the employer's agent for compensation matters (100a). A notice of employee's injury, form 201, and claim for compensation, were delivered to General Dynamics by letter dated May 13, 1974 (101a). The Employer's First Report of Accident, form 202, dated June 11, 1974 was received in the Office of Workers' Compensation Program on June 13, 1974 (104a). General Dynamics filed a notice of controversy, form 207, dated June 14, 1974 (106a).

After several informal conferences this matter was referred to the Office of Adm. Law Judges by the Assistant Deputy Commissioner on June 5, 1975. A hearing was held before the Honorable Peter McC. Giesey, Adm. Law Judge, United States Department of Labor at New London, Conn., on September 11, 1975.

This hearing resulted in an order and decision by the Adm. Law Judge dated December 18, 1975 (10a). Both the claimant Mr. Gray and General Dynamics filed timely notices of appeal (146a, 148a) and petitions for review of the order with the Benefits Review Board (150a, 153a).

The Benefits Review Board issued its order and decision dated December 21, 1976 (1a). General Dynamics timely filed its notice of appeal to this Court pursuant to 33 USC § 921 (Aa).

POINT I

The Uncontradicted Medical Evidence in the Record Shows Gray Had Well-Advanced Asbestosis as of April 1, 1973, If Not Earlier, and Was Disabled From Work Prior to That Time Due to the Effects of That Occupational Disease.

The only medical expert in this case, Dr. Gaensler, testified that in his opinion Gray had the occupational disease of asbestosis in September, 1972 (26a), which is long before INA went off the risk on April 1, 1973.

Asbestosis is an occupational disease which can develop in some employees from a long exposure to working with asbestos products. The clinical manifestations of asbestosis do not occur until between five and ten years after exposure to the disease-causing asbestos fibers (26a, 29a). Tiny asbestos fibers become airborne and are inhaled into the respiratory system, ultimately lodging in the tiny air spaces of the lungs. The body's natural immunological forces coat these asbestos fibers with a protective substance. The presence of these foreign bodies causes an inflammation in the lung tissue and results in the formation of fibrous tissue which slowly spreads throughout the lung area causing lung capacity to shrink. Dyspnea (a marked shortness of breath), chronic fibrosis, pleuritis and pleural thickening are common symptoms and consequences of asbestosis.

The uncontradicted medical evidence in the record before the Adm. Law Judge and Benefits Review Board clearly demonstrates that the claimant, Sammie Gray, had the occupational disease of asbestosis and suffered a disabling injury from the consequences of this disease in March, 1973, if not earlier, in June, 1972.

Beginning in June, 1972, Gray experienced difficulties in breathing and was out of work for seven days. In August, 1972, his breathing problem was diagnosed by the Hospital as probable pleuritis. In September, 1972, x-rays were taken which showed the presence of pleural scarring. Beginning in mid-March, 1973, Gray was absent from work for approximately six weeks with complaints of generalized pulmonary problems.

Based on the evidence in the record, the Adm. Law Judge found that "[i]n March, 1973, Mr. Gray *experienced a disabling illness* consisting of generalized pulmonary nose and throat difficulties. He could not work for six weeks." (Emphasis added, 11a).

The Benefits Review Board also found "[t]he record indicates that asbestosis symptoms manifested themselves [in Gray] prior to the time the Insurance Company of North America went off the risk." (Emphasis added, 7a).

The only medical expert in this case was the aforementioned Dr. Edward Gaensler, a specialist in pulmonary diseases. Dr. Gaensler graduated from the Harvard Medical School and is currently a professor at the Boston University School of Medicine and a lecturer at the Harvard and Tufts University medical schools (21a). He personally examined Gray and the medical records in this case including the report of an x-ray taken of Gray in September, 1972 and his Hospital report dated August 22, 1972, petitioner's exhibits 1 and 2 (22a, 25a).

Dr. Gaensler testified that in his opinion Gray had asbestosis in September, 1972 (26a). Referring to the diagnosis of probable pleuritis in the August, 1972 Hospital report, he stated, "I would think these are the early symptoms of subsequent development of asbestosis" (26a).

The doctor testified that Gray's hospital report dated August 22, 1972 and the x-ray report of September, 1972, showing he had pleural scarring meant that Gray had manifestations in September, 1972 of an exposure to asbestos (30a).

Dr. Gaensler also testified that the clinical manifestations of asbestosis occur as many as six, eight or ten years after initial exposure (26a-27a). He presumed that such manifestations as present in Gray in 1972 "must be attributed to things that happen many years ago" (27a).

The Adm. Law Judge believed this witness, Dr. Gaensler, and recognized that Gray "in all probability" had asbestosis before the diagnosis of October, 1973:

"It is my opinion that the evidence also demonstrates that, but for the limitations, or state of the art, of diagnostic medicine, Mr. Gray's condition might have been diagnosed as asbestosis long before the biopsy in October, 1973 and he would, as a matter of course, been advised of his disability to continue his employment as a logger. * * *

"I am inclined to agree with the expert witness, [Dr. Gaensler], a physician specializing in pulmonary diseases and thoracic surgery, *that in all probability, Gray did have asbestosis at some time before the condition was diagnosed and made known to him.* It is a medical commonplace that the development of asbestosis is slow and irreversible." (Emphasis added, 13a).

As stated *supra* the Benefits Review Board, also found "[t]he record indicates that asbestosis symptoms manifested themselves prior to the time the Insurance Company of North America went off the risk." (Emphasis added, 7a).

In fact both the Adm. Law Judge and the Benefits Review Board, pursuant to 33 USC § 910, included as a component of Gray's average annual wage his overtime figures for *calendar year 1972*, instead of the year immediately preceding September 27, 1973 because they found Gray had lost overtime during that year "*because of his illness.*" Thus, both the Adm. Law Judge and the Benefits Review Board found that Gray was suffering the accumulated effects of asbestosis during the entire year, September, 1972 through September, 1973 before he left work in September, 1973.

Despite these findings, unaccountably the Benefits Review Board held that General Dynamics, as self-insurer, rather than the INA would be ultimately liable between themselves for the award. Here lies the core of the petitioner's appeal.

POINT II

The Benefits Review Board Erred in Using as a Test for Determining Carrier Liability *In This Particular Case*, the Date Gray Said He First Became Aware That His Symptoms Were Related to His Employment (September or October, 1973), Rather Than an Earlier Date at Which Time the Uncontradicted Medical Evidence in the Record Shows Gray Had an Injury (the Occupational Disease of Asbestosis) and Suffered a Disabling Illness Due to This Injury, viz. March, 1973 or Earlier.

The Benefits Review Board based its determination of carrier liability in this case on the authority of the last employer/last carrier rule of *Travelers Insurance Co. v. Cardillo*, 225 F. 2d 137 (2nd Cir. 1955), cert. den. 350 U.S. 913. General Dynamics does not dispute the *Cardillo*

doctrine but will show *infra* why the *Cardillo* rule for determinating carrier liability does not apply *in this particular case*.

There is no question that General Dynamics is liable for and has paid as *Employer*, the compensation benefits due Gray. However, General Dynamics contends that the Benefits Review Board erred in finding it, and not the INA liable as *insurer* (as distinguished from the issue of employer liability) for the compensation benefits under the circumstances in this case.

The Benefits Review Board is in error when it states, "the Board finds that the administrative law judge properly held that General Dynamics Corporation rather than the Insurance Company of North America is responsible for the payment of benefits under the Act" (6a).

The Adm. Law Judge clearly and unequivocally refused to make a finding as to which carrier, whether General Dynamics as self-insurer, or the INA as its former insurer, would be ultimately liable for the award as between themselves:

"In any case, the question of a former carrier's liability to the employer bearing primary responsibility in a case such as this lies between these parties and the appropriate forum for the determination of their respective obligations is a court and not an administrative agency." (14a).

General Dynamics contends the Benefits Review Board erred in using as a test for determining *carrier liability in this particular case*, the date when it believes that Gray became aware that his symptoms were related to his employment (September or October, 1973), rather than an earlier date at which time the uncontradicted medical evi-

dence in the record shows Mr. Gray had the occupational disease and suffered a disabling injury due to it, viz., March, 1973, or earlier.

There is a three-fold requirement for compensation under the LHWCA. First, there must be coverage for the particular employee in terms of status and situs.¹ Second, there must be an "injury" within the terms of the Act,² and third, there must be a disability resulting from that injury.³

It is undisputed in this case that Mr. Gray is a covered employee within the terms of Section 3a of the Act (33 USC §903a). Section 3a makes clear that compensation will be paid only if the disability "results from an injury." "Disability" as defined by the Act in Section 2(10) [33 USC §902(10)] "means incapacity because of injury" to earn wages. *Hence, there must be a finding of an injury.*

The LHWCA, Section 2(2), [33 USC §902(2)] defines injury as follows:

"When used in this chapter . . . the term 'injury' means accidental injury . . . arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment. . . ."

The Adm. Law Judge was in error when he failed to determine the precise time of the 'injury' in this case. He made only a finding that Gray was "disabled" at the time he left work in September, 1973 (13a).

¹ See 33 USC §903a.

² See 33 USC §902(2)

³ See 33 USC §902(10)

It is well established that "injury" and "disability" are not synonymous under the LHWCA, *Aerojet General Shipyards, Inc. v. O'Keeffe*, 413 F. 2d 793 (5th Cir. 1969); see 33 USC §902(2) and §902(10) *supra*.

General Dynamics contends that the uncontradicted medical testimony in this case clearly shows that Gray had an "injury" (the occupational disease of asbestosis) as defined in 33 USC §902(2) as of April 1, 1973 and prior to the time INA went off the risk.

Travelers Insurance Co. v. Cardillo, 225 F. 2d 137 (2nd Cir. 1955) is easily distinguished:

The Adm. Law Judge cited *Cardillo* only for authority that General Dynamics, as employer, is liable for the award. He expressly refused to make a determination of ultimate liability for the award as between General Dynamics as self-insurer and INA as its carrier (14a).

In *Cardillo*, *supra*, at 145, this Court laid down a rule that as between successive employers in occupational disease cases arising under the LHWCA, the last employer in whose employment the injured employee was exposed to "injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award."

The *Cardillo* Court, *supra* at 145, also determined that liability for the award as between successive insurance carriers would be handled "in the same manner". It formulated this general rule over twenty years ago for a number of reasons, paramount of which was the "dearth of medical certainty with respect to the time that is required for them (occupational disease) to develop" *supra* at 144. As to

the issue of carrier liability, the *Cardillo* Court, *supra*, at 145, admitted, "Here we are frankly groping in the dark."

Cardillo concerned three suits, all involving several successive carriers, and in one case, successive employers. In three claimants were found to have been suffering loss of hearing due to their occupations. The central issue in *Cardillo* was a determination of when that loss of hearing had begun and how far it had progressed during the successive periods of employment and insurance coverage.

General Dynamics contends that the *Cardillo* issues do not exist in our case. There are no successive employers in our case. General Dynamics was the only employer during the times concerned herein. It is also contended that the issue of when Gray's occupational disease of asbestosis *began* is irrelevant in this case.

The only issue in this case is whether the uncontradicted medical evidence in our case shows that Gray had asbestosis as of April 1, 1973, when INA went off the risk. The medical evidence in the record clearly demonstrates that he did. In other words Gray had an "injury" within the meaning of the LHWCA, Section 2(2). We contend that Gray's disabilities subsequent to March, 1973, were the natural and inevitable result of the well-established, irreversible and inevitably-disabling progress of his disease. Stated differently the injury (disease) had taken hold in Gray at some time prior to April 1, 1973. The disease's symptoms and disabling effects had already manifested themselves while INA was still on the risk. It had already caused Gray's previous periods of disability from work during June, 1972, and March, 1973, and was to shortly ripen into total permanent disability commencing September 27, 1973.

Clearly, the testimony in this case shows that the period of disability commencing in September, 1973, was not the

result of new injury but was further disability resulting solely from the injury (disease) Gray had in March, 1973 or earlier. Therefore INA should be liable for the award in our case.

Mr. Gray had an "injury" (asbestosis) prior to April 1, 1973. The fact that Gray's last period of disability commenced after April 1, 1973, cannot change the uncontradicted fact that he had asbestosis, and was suffering a disability from it, prior to April 1, 1973. It must be stressed that date of injury and date of disability are not synonymous under the LHWCA.

The Benefits Review Board in our case interpreted *Cardillo* to find liable the carrier on the risk "on the date claimant became aware that his symptoms were related to his employment" (7a).

General Dynamics does not urge the Court to abandon the *Cardillo* rule for determining employer and carrier liability when the application of said rule is justified by the facts of the case. However, that rule is inappropriate here. The Benefits Review Board's test would be appropriate, for example, in determining when a statute of limitations begins to run for purposes of filing a claim for compensation under the LHWCA, see 33 USC §913. But it is not an appropriate test to determine carrier liability in the circumstances of our case.

The *Cardillo* test may also be appropriate to determine carrier liability where there is no medical evidence or where successive employers and/or carriers are in dispute as to when the employee first contracted the occupational disease. However, such is not the issue here. General Dynamics contends that the issue in our case is not when Gray first developed asbestosis, but whether he had asbestosis as of April 1, 1973 when INA went off the risk.

The uncontradicted medical evidence* clearly shows that Mr. Gray had an occupational disease prior to April 1, 1973, which may not have been precisely diagnosed at that time, but which *unchanged in nature*, came to be recognized after further tests and a biopsy, as having been asbestosis. The Benefits Review Board recognized this when it stated "[t]he record indicates that asbestosis symptoms manifested themselves [in Gray] prior to the time the Insurance Company of North America went off the risk" (7a). This finding by the Benefits Review Board is supported by the only medical evidence in our case.

POINT III

Assuming Arguendo That Cardillo is the Appropriate Test in This Case, the Insurance Company of North America Failed to Meet Its Burden of Proving That Gray Continued to be Exposed to "Injurious Stimuli" Between May 1, 1973, When He Returned to Work and September 27, 1973, When He Again Left Work, and That Such Exposure Was Causally Related to His Disability Commencing in September, 1973.

INA had been General Dynamics' carrier for workmen's compensation under the LHWCA from before 1962 when Gray was first employed by General Dynamics until April 1, 1973. As has been demonstrated, *supra*, Gray had an "injury" (asbestosis) and a resulting disabling illness commencing prior to April 1, 1973 (11a). He lost six weeks of work due to that "injury" while INA was on the risk.

* We keep emphasizing the uncontradicted nature of the medical evidence in this case because it is not open to question whether Gray had asbestosis as of April 1, 1973. Rather it is a matter of unrefuted medical evidence.

Having provided coverage for a disease that had been developing for a period of five to ten years, during all of which time INA had collected premiums from General Dynamics, INA at the administrative level was faced with the burden of proving that the events from May 1, 1973, when Gray returned to work, to September 27, 1973, somehow medically removed it from the risk.

INA had to prove that Gray's disability commencing in September, 1973, was medically unrelated to the asbestosis he had developed during all the years INA was on the risk and which effects the Benefits Review Board has found were manifested prior to the time INA went off the risk.

Stated in another way, under *Cardillo*, INA had a dual burden in this case. First, it had to show that Gray was actually exposed to the "injurious stimuli" of asbestos fibers during the period of his last employment from May 1, 1973 to September 27, 1973. Second, it had to show causation between the "injurious stimuli" and the disability commencing September 27, 1973. General Dynamics contends that the record shows INA failed to meet its burden on either count.

There is no testimony in the record that when Gray returned to work at General Dynamics Electric Boat Division, he was exposed to asbestos fibers or that if exposed, their concentration was harmful. The record is silent on this issue.

Even assuming arguendo that Gray was exposed to asbestos fibers during the summer of 1973, the testimony in this case clearly shows that such exposure would not have caused his period of disability commencing on September 27, 1973, which was a result of the inevitable natural progression of his disease.

The medical expert, Dr. Gaensler, testified on direct examination as follows:

"Q. In view, Doctor, of your examination and medical records that you have examined, do you have an opinion as to whether or not the fact that this man worked from about May 1, of '73 up until the middle of September '73, would you have an opinion as to whether this period of time that he worked played any part in the disease or the disability for which he was treated commencing in September of 1973?"

"A. I think it did not. I think the problems that he had were related to exposure of many years, starting many years ago" (27-28a).

On cross examination by INA, Dr. Gaensler testified as follows:

"Q. Why should the exposure of the last four months [May through September, 1973] be any different from exposure four months prior thereto?"

"A. Because . . . such manifestations as asbestosis and pleural effusion as he [Gray] had at the general time [September, 1973] were the result of things that undoubtedly happened a minimum of five to seven years earlier and possibly ten or twelve years earlier."

"Q. And later exposure would have no affect (sic)?"

"A. Later exposure, again, might have an affect (sic) on what one might see ten or fifteen years from now *but later exposure would not have any affect (sic) on this particular illness.*" (Emphasis added 28-29a).

Had Gray returned to work after May 1, 1973, with a *different* employer, for example, the Pratt & Whitney Engineering Co., where there was no exposure to asbestos,

clearly INA would have been liable for the asbestosis-caused occupational disability commencing March, 1973 and all disabling recurrences thereafter. No one would seriously argue to the contrary. Therefore his return to work for General Dynamics, with an absence of proof of exposure to injurious stimuli, should not change that conclusion.

The medical evidence in our case demonstrates that what transpired between Gray's return to work on May 1, 1973 and September 27, 1973, was of no medical significance to his disability commencing after September 27, 1973. All the medical evidence is to the contrary, that the disabling effects of asbestosis are irreversible and any possible exposure during the summer of 1973 would have had no effect on his disability of September, 1973.

INA failed to prove Gray was injuriously exposed to asbestos during the summer of 1973; that such exposure, if any, was causally related to his disability commencing in September 1973; or, that this disability was caused by anything other than the natural, irreversible, inevitably-disabling progression of the asbestosis Gray had prior to April 1, 1973.

CONCLUSION

General Dynamics asks this Court to reverse the Benefits Review Board decision and on the basis of the uncontradicted testimony, to find the Insurance Company of North America liable for all workmen's compensation amounts due herein; or in the alternative to remand this case for findings and conclusions supported by the evidence or in the discretion of the lower tribunal for such further

testimony on carrier liability as may be deemed necessary;
and for such other and further relief as may be appropriate.

Respectfully submitted,

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